The position was that the Court and one assessor were agreed in the opinion that the accused was not guilty of murder but was guilty of inflicting a blow but not necessarily the blow which killed the deceased.

It was then the duty of the Court, under section 196(i) of the Criminal Procedure Code to give judgment in accordance with this agreed opinion.

The only offence for which judgment could be given on this agreed opinion is the offence of causing hurt (in this case under section 324 of the Penal Code).

To give judgment that the accused was guilty of attempted murder was clearly wrong.

This Court can, under section 42(i)(b) of the Courts Enactment, alter the finding to section 324, Penal Code.

But it is clear to me from the record of the trial that this is a case in which a retrial on the original charge should be ordered, if there is jurisdiction to make such an order.

Certain evidence was wrongly admitted and there was also misdirection in the summing up to the assessors. The application of section 34 of the Penal Code — "common intention" was not explained to the assessors. Instead they were told —

> "If you have any doubt in your minds that the accused was guilty of the offence, namely, if you have any doubt that he killed this old Chinaman, that he was the first person who gave the first blow which caused the death of the deceased, then you are entitled to find him not guilty."

The question arises then whether under section 42(i)(b) of the Courts Enactment the Court of Appeal has jurisdiction to order a retrial on the original charge under section 302 of the Penal Code.

Section 42(i)(b) of the Courts Enactment corresponds with section 423(i)(b) of the Indian Code of Criminal Procedure.

The relevant Indian decisions on this point are contained in *Krishna Dhan Mandal* v. *Queen-Empress*, I.L.R. 22 Cal. 377, *Nazimuddin* v. *King-Emperor*, I.L.R. 40 Cal. 163 and *Kamban Bali Reddy* v. *King-Emperor*, I.L.R. 37 Mad. 119 and are that in a case such as the present where an accused person has been tried on a charge of murder and acquitted on that charge but convicted on a lesser charge such as culpable homicide not amounting to murder or grievous
[74] hurt and he [74] appeals against that conviction, then the Court of Appeal has jurisdiction to order a retrial and such order, unless so expressly limited, is an order to retry on the original charges. The first trial is set aside and cancelled and the proceedings commence *de novo* with the original charges, unless the prosecution decides at the retrial to proceed on a reduced charge.

I am of opinion that this Court has similar powers under section 42(i)(b) of the Courts Enactment.

I consider that in the present case the order of this Court should be that the accused be retried.

Re-trial ordered.

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[75] PRIVY COUNCIL REPORTS [75]

THE MONTREAL TRUST CO. v. THE BRITISH COLUMBIA LAND & INVESTMENT AGENCY, LTD.

[P.C. (Lords Alness, Maugham and Roche) November 15, 1935]
[Privy Council Appeal No. 30 of 1935]

Vendor and purchaser — Equity of redemption — Sale of — Indemnity — Absence of covenant of — Exclusion of implied indemnity.

The implied obligation of the purchaser of an equity of redemption to indemnify his vendor against liability under the mortgage debt may be negatived by the circumstances of any particular case. It is usual in modern conveyancing practice to insert an express covenant of indemnity, and the absence of such a covenant in a formal transfer may lead to the conclusion that the deed of transfer contains a complete record of the bargain between the parties.

Mills v. *United Counties* Bank, [1912] 1 Ch. 231, commented upon.

Walker v. *Dikson*, (1893) 20 Ont. A.R. 96; *Campbell* v. *Douglas*, 34 O.L.R. 580; 54 S.C.R. 28 followed.

PRIVY COUNCIL APPEAL from Canada.

C. R. R. Romer for the appellants.

G. P. Slade for the respondents.

Cur. Adv. Vult.

Their Lordships' judgment was delivered by —

Lord Maugham: In the months of January and February, 1926 one T. R. Nickson, who resided in the City of Vancouver, found himself in a position of considerable difficulty. He controlled and managed two companies, the Prudential Holdings, Limited, and the Nickson Construction Company, Limited, in which he was practically the sole share-holder, and he was being pressed by the Royal Bank of Canada to discharge the sum of $15,500 which was owed by the Construction Company to the bank. There had been a loan made to the Construction Company the security for which proved to be worthless, and early in February Mr. B. L. Mitchell, the manager of the Royal Bank in Vancouver, sent for Nickson and told him that the loan must be repaid immediately. Nickson applied to a friend of his, the late C. V. Cummings of Vancouver, for assistance, and Cummings thereupon called upon Mitchell at the bank, and after verifying certain statements made by Nickson, informed Mitchell that he was ready to make an advance upon having security. Nickson was not called at the trial of the action for some unexplained reason. Mitchell, however, was called and in addition to him a Mr. Coulter, a barrister and solicitor practising in Vancouver who had known Nickson for a long time and was the secretary of and held one share in Prudential Holdings, Limited; and he was a friend of Cummings. The evidence of Coulter and Mitchell shows quite clearly that the basis of the whole transaction was an advance by Cummings to Nickson to be secured in some shape or form by the latter.

The transaction was, however, carried out in a somewhat peculiar form owing to the circumstances in which the two principals found themselves. Nickson on his side had no assets except shares standing in his own name, but as stated he controlled the Prudential Holdings, Limited, and that company was the registered owner of certain lands in Vancouver which may be described as the Powell Street property and also of some lands which may be called the Burrard Street property. By a mortgage dated 15th January, 1925 the Powell Street property had been mortgaged by the Prudential Holdings, Limited, to the respondents to secure a loan of $13,000 with interest thereon at 6 per cent. per annum, and this mortgage contained a covenant by the Prudential Holdings, Limited, as mortgagors for the payment of the mortgage money and interest. The Burrard Street property was also in mortgage to secure a sum of $6,000 and interest. In these circumstances Nickson proposed to procure the Prudential Holdings, Limited, to supply the necessary security (whatever its form might be) for an advance which in effect was to be made for the purpose of enabling the Construction Company to discharge its liability to the bank. On the other hand, Cummings, for private reasons of his own the nature of which did not appear in evidence, informed Mitchell that he did not want to have his name appear in the transaction in any way. Mitchell said he knew how to handle the matter with the assistance of a trust company, and he telephoned to the manager of the Montreal Trust Company, the appellants in the present case, and got that company to agree to act as nominees for Cummings in the transaction.

It should be added, though nothing turns on this fact, that the name of Cummings was not at this time disclosed to the appellants, and the indemnity agreement which Cummings had to execute in the usual course in favour of the appellants was retained by the bank and was not to be called for by the appellants until they were entitled to enforce its terms. In the various steps that were taken to carry the matter to completion Mitchell acted as agent for both parties; and it is clear that the bank was itself directly interested since the $15,500 to the knowledge of all parties was to be paid to the bank so as to discharge a debt due to the bank. Their Lordships think that in these circumstances the evidence of Mitchell was [76] clearly [76] admissible. Mitchell asked the bank's solicitor to investigate the titles to the two properties, and Cummings having expressed the view that a deed, by which he meant a conveyance absolute in form would probably simplify matters upon a future sale of the properties, it was arranged that there should be a conveyance absolute in form. Accordingly by indenture or deed of transfer of 15th February, 1926 made between the Prudential Holdings, Limited, and the appellants, it was witnessed that in consideration of $15,500 then paid to the Prudential Holdings, Limited, that company granted to the appellants their heirs and assigns for ever the Burrard Street property and the Powell Street property subject to the respective mortgages thereon, and in particular subject to the mortgage dated 15th January, 1925 on the Powell Street property which was then subsisting in favour of the respondents. The indenture contained certain covenants for title, but it did not contain any covenant of indemnity on the part of the appellants to indemnify the Prudential Holdings, Limited, against liability under the mortgages referred to. The seal of the company was affixed by Nickson the president and Coulter the secretary of the company. This indenture was duly registered in the Land Registry of British Columbia. The Registrar appears to have required proof as to the authority of Nickson and Coulter to affix the seal of the company to the deed. To meet this requirement a meeting of the directors of the company was held on 15th February, 1926, and it was there moved by Nickson and seconded by Coulter that the company authorised and confirmed the sale from the company to the appellants of the properties mentioned for the price of $15,500 adding the words:—

"the said Montreal Trust Company to assume all mortgages against the properties hereby authorised to be sold;"

and Nickson and Coulter, the president and the secretary of the company, were authorised to sign the deed of transfer and to affix the seal of the company thereto. There is no evidence to show and there seems to be no reason whatever to suppose that Cummings or the appellants were aware at the time of the singular terms of this resolution, and there is ample evidence to show that the Montreal Trust Company never intended to assume any liability for the mortgages in question. The resolution, however, appears to have been lodged with the Registrar, and was probably open to the inspection of the public. It is plain that the transaction, whatever its legal effect, was intended to make possible the desired application of the sum of money which Cummings was ready to supply; and that was effected in the following manner. Cummings advanced the required amount to the bank. The bank sent its cheque for $15,500 to the appellants. The appellants at the bank's request made out a cheque in favour of Prudential Holdings, Limited, for $15,033.11, representing the alleged purchase price of the property after necessary adjustments. The cheque to the Prudential Holdings, Limited, was by endorsement transferred to the bank and applied in payment of the indebtedness of the Nickson Construction Company to the bank. Mitchell on behalf of all parties kept control of the transaction so as to ensure that the sum advanced by Cummings was used to discharge the indebtedness of the Construction Company with the assistance of the appellants, who acted throughout merely as nominees of Cummings, their unnamed principal. The true nature of the transaction so far as the appellants were concerned appears perfectly clear from letters exchanged between Mitchell and his assistant manager one Allingham on the one hand, and the appellants on the other, dated 18th February, 1926. The letters confirmed that the bank desired the appellants to purchase in their name from the Prudential Holdings, Limited, the properties above referred to. The bank undertook to obtain an indemnity from the bank's principal (i.e., Cummings) protecting the appellants from any loss in the transaction. The letters stated in terms that it was agreed that the appellants were not to be responsible in any way in respect of the said lands or the mortgages upon them either to pay charges upon the said lands or otherwise beyond the amount of rents from the said lands which should come

into the hands of the appellants and moneys paid to the appellants by the bank's principal for payment of charges on the said lands.

A few months later the appellants sold the Burrard Street property to a purchaser and paid over the net proceeds of the sale to the bank which accounted for the same to Cummings. There was a serious depreciation of properties in Canada beginning about the year 1929. The respondents as first mortgagees who were of course aware by this time of the deed of transfer to the appellants since they had received payment of interest on the mortgage from them, began to press for payment and a correspondence ensued in the course of which the respondents became fully informed that the appellants were merely acting for a client who was the true owner of the property. In December 1932 the respondents thought it would be worth while to see if the appellants could be made liable under an implied covenant based upon the form of the deed of transfer. By an indenture dated 1st June, 1933 it was witnessed that in consideration of the payment of one
[77] dollar by the respondents [77] to Prudential Holdings Limited, the company assigned to the respondents the benefit and advantage of all claims or rights which they had, or thereafter might have, against the appellants either at law or in equity, or whether by way of claim for indemnity in respect of the mortgage dated 15th January, 1925, or the principal, interest, or any other moneys remaining unpaid thereunder or otherwise howsoever and did assign to the respondents all their right, title and interest against the appellants under or with respect to the mortgage and the conveyance dated 15th February, 1926, or either of them, and whether the claim arose or should arise under an express or under an implied covenant. Notice of this assignment was given on 23rd June, 1933 to the appellants and the present action followed.

Two points were relied on by the appellants. In the first place it was contended that notwithstanding the circumstance that all the written documents which came into existence in the course of the transaction above stated indicated a sale and purchase, the parol evidence ought nevertheless to be held as establishing that in equity the deed of transfer ought to be treated as a second mortgage. If this were the right view it would be impossible for the respondents to contend that the appellants had come under an implied obligation to indemnify Prudential Holdings, Limited, in respect of the first mortgage since a second mortgagee is in no way personally liable to discharge the first mortgage. In the second place it is contended that having regard to the admitted fact that the appellants were merely nominees of Cummings and to the other circumstances of the case, there is sufficient ground for holding that the *prima facie* obligation in equity to indemnify Prudential Holdings, Limited, against the mortgage debt has been rebutted.

On the first point it may be observed that the real question is whether the bargain as between Cummings and Nickson was such that Nickson on his side could neither in his own name, nor in the name of his company, redeem the property on payment of the principal sum paid or advanced and interest thereon; and whether Cummings on his side was entitled to sue Nickson, or it may be, his company for payment of the principal and interest. The alternative, of course, is that the Powell Street property passed absolutely (subject to the first mortgage) to the appellants as trustees for Cummings, and had Cummings had no right whatever against either Nickson or Prudential Holdings, Limited, to repayment of the purchase money. As already pointed out, the appellants being mere nominees, it was immaterial to them which was the true view since at any time Cummings could have called upon the appellants to transfer to him or to some other trustee. The position of Prudential Holdings, Limited, was a curious one. The transaction from the point of view of company law was wholly irregular, for a limited company has no right either to mortgage or to sell its assets for the benefit of a third party. In substance Prudential Holdings, Limited, either gave away its interest in the Powell Street property or mortgaged that interest for the benefit of the third party. As against Nickson it is clear that that company had a right, for what it was worth, to recover the sum of $15,500 from him, and if that right were enforced either by Prudential Holdings, Limited, or its liquidator, the right, if any to redeem the property would of course be re-vested in Nickson. In the above circumstances it seems to their Lordships that Prudential Holdnigs, Limited, was in effect a mere nominee of Nickson almost to the same extent as the appellants were nominees of Cummings, and the important thing to discover is not so much the intention of the directors of Prudential Holdings, Limited, and of the appellants, but to ascertain the true intention of Nickson on the one hand and Cummings on the other.

In this connection it is important at this point to state that the evidence is conclusive to show that Nickson viewed the transaction as one which was of the nature of a mortgage and not of an absolute conveyance. Not only did he give an option to P. Burnes and Company to purchase the Powell Street property subject to the mortgage to the respondents, but he also wrote to Mitchell on 20th June, 1927 asking him to get ready a statement showing "just how much will be owing to the Montreal Trust Company." It may be added that he was informed by the Royal Bank that the amount owing at that time was $12,557 together with interest from date of purchase. It seems to their Lordships that there are substantial grounds for coming to the conclusion that the deed of transfer was intended to operate as security for the purpose of protecting Cummings as regards his advance and that he would not have been in a position to resist redemption. On the other hand it is true that strong evidence is required to establish the contention that a conveyance in form absolute ought to be treated as a mortgage, since the contention requires that the written document should be in some sense modified or added to for the purpose for carrying out the true intent of both parties to it. Moreover the evidence of Mr. Bone, the manager of the appellants' business in Vancouver, is not favourable to the view that the deed was intended to have effect as a mortgage. It does not seem to their Lordships necessary to express a final opinion on this point since they are satisfied that the appellants succeed on the second ground. The claim

of the respondents is founded upon the doctrine that the purchaser of an equity of redemption is bound under an obligation of conscience to indemnify
[78] [78] the vendor against the liability on the mortgage debt. The obligation, as Fletcher Moulton L.J. said in *Mills* v. *United Counties Bank,* [1912] 1 Ch. 231, is based on good sense and it relates to every case where you can reasonably imply that it was the intention of the parties that such an indemnity should be given.

It may be observed that if the property possesses a speculative value so that it is by no means certain that upon realisation there will be a sum sufficient to satisfy the mortgage-debt and interest, a purchaser of the equity of redemption might well refuse to give a covenant of indemnity to the mortgagor. Nor does this necessarily result in making a present to the purchaser of the equity, for, the mortgagor, if called upon to pay the amount due under the covenant for payment contained in the mortgage is entitled to take a transfer of the mortgage from the mortgagee and can then if he pleases sell or foreclose. Plainly there are a number of cases in which the purchaser of the equity would refuse to give a covenant of indemnity, especially if he were aware that the vendor of the equity could sell the right of indemnity for cash to the mortgagee. There are cases in which the purchaser might be willing to give such a covenant only on condition that it was personal to the vendor and therefore not assignable. Their Lordships observe that in rebutting the implication of an equity such as this, the appellants are not claiming to modify or affect the deed of transfer in any way. They are doing no more than is involved in the contention that the registered deed of transfer fully expresses the contract between the parties. For the reasons above indicated the true bargain between the parties in the present case has to be ascertained by considering the position which Nickson occupied in relation to Cummings. It seems to their Lordships quite impossible to believe that if Nickson had informed Cummings that either Cummings himself or a trust company as his nominees would be required to assume responsibility for the first mortgage, and for that purpose to enter into a covenant either with Nickson himself or with Prudential Holdings, Limited, the proposal would not have been wholly rejected. Neither Nickson nor the Prudential Holdings, Limited, was in a position to exact in the circumstances any such term from Cummings, nor did they attempt to do so. The evidence of Mitchell, Coulter and also of Bone on this point is uncontradicted, and no reason seems to have been given for the absence of Nickson from the witness-box. The position of the appellants is even stronger. It is most unusual for a bare trustee to enter into any covenant in connection with a conveyancing matter. It is well known that trustees for sale are not in the habit of entering into covenants for title, and purchasers have to be content with the covenant that the trustees have not themselves encumbered.

Without deciding that the circumstance that an apparent purchaser of an equity of redemption is to the knowledge of the apparent vendor a trustee for a third party is alone sufficient to rebut the *prima facie* implication above stated, it is clear that very little is sufficient in such a case to show that no such implication can fairly be made. The letter of the 18th February, 1926, above referred to, written by Mitchell, the agent for both parties to the appellants, is sufficient to show that the appellants were not prepared to undertake the implied liability under discussion, and did not suppose that they were doing so; and for the reasons already given Cummings, who was liable under his express covenant to indemnify the appellants, could not fairly be asked directly or indirectly to undertake such an obligation. It is the modern practice in sales of an equity of redemption to insert an express covenant of indemnity by the purchaser where such a covenant is part of the agreement, and the absence of such a covenant in the circumstances of the persent case affords an additional reason for the conclusion that the deed of transfer contains a complete record of the bargain between the parties. Their Lordships agree with the decisions of the Canadian Courts in similar matters to which they were referred and in particular with the cases of *Walker* v. *Dickson,* (1893) 20 Ont. A.R. 96, and *Campbell* v. *Douglas,* 34 O.L.R. 580 and 54 S.C.R. 28. Both those decisions seemed to their Lordships strongly to support the conclusion at which they have arrived.

The respondents based an argument upon the doctrine of estoppel. They contended that having regard to the form of the deed of transfer and to the fact that it and the resolution above referred to were duly registered in the Land Registry, the appellants were estopped as against the respondents from alleging that the relationship of vendor and purchaser did not arise between the Prudential Holdings, Limited, and the appellants. In their Lordships' view there was no evidence that the respondents either saw or acted upon the documents in the Land Registry, still less was there evidence that the respondents changed their position to their prejudice in consequence of the form of the deed of transfer or of the resolution of even date. In these circumstances no argument founded on estoppel can prevail. In substance it will be noted that their Lordships agree with the careful and elaborate dissenting judgment of Mr. Justice Macdonald except that they do not think it necessary to decide whether the deed of transfer ought to be held to operate as a mortgage. Their Lordships will therefore humbly advise His Majesty that the appeal in the present case [79] should be allowed and that the [79] action should be dismissed with costs here and below.

Appeal allowed.

Solicitors: *Linklaters & Paines; Blake & Redden.*

TYAGARAJA MUDALIAR & ANOR. v. VEDATHANNI

[P.C. (Lords Thankerton and Alness and Sir John Wallis) December 6, 1935]
[Privy Council Appeal No. 13 of 1934]

Evidence — Written contract — Oral evidence — When admissible — Indian Evidence Act, (1872) ss.91, 92.

Contract — Agreement embodied in document — Party to agreement told that stipulation in agreement would not be enforced — Document does not amount to real agreement — Other party cannot sue on it.